(2)

No. 89-1987

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Of Counsel:
CARYL S. BERNSTEIN
CAROLYN J.A. SWIFT
FEDERAL NATIONAL MORTGAGE ASSOCIATION
3900 Wisconsin Ave., N.W.
Washington, DC 20016
(202) 752-7000

JOSEPH ANGLAND *
FELIX B. LAUGHLIN
DAVID C. GARLOCK
RICHARD F. NEEL, JR.
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
1775 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 862-1000
Attorneys for Respondent

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether a financial institution, having incurred real economic losses on certain mortgages it holds, realizes a deductible loss when it exchanges those mortgages for a group of mortgages that (i) have different obligors, (ii) are secured by different real properties, (iii) have underlying real properties that vary in geographical distribution (rural vs. urban), and (iv) were expected to and did perform differently in terms of delinquencies, foreclosures and prepayments.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, respondent, the Federal National Mortgage Association, states that it has no parent company and no operating subsidiaries or affiliates.

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Respondent, the Federal National Mortgage Association ("FNMA"), respectfully asks that this Court deny the petition for a writ of certiorari sought by the Commissioner of Internal Revenue (the "Commissioner") in this case. Three courts of appeals—the District of Columbia, Fifth and Sixth Circuits—have decided five cases, including this one, involving the tax deductibility of losses realized in Concurrent Mortgage Sales ("CMS") transactions.[1] Taxpayers prevailed in four of the five cases, losing only the one case decided by the Sixth Cir-

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[1] The cases, in addition to this one, are: *San Antonio Savings Ass'n v. Commissioner*, 887 F.2d 577 (5th Cir. 1989), *petition for cert. filed*, No. 89-1928; *Centennial Savings Bank v. United States*, 887 F.2d 595 (5th Cir. 1989), *petition for cert. filed*, No. 89-1926; *First Federal Savings and Loan Ass'n of Temple v. United States*, 887 F.2d 593 (5th Cir. 1989), *petition for cert. filed*, No. 89-1927; and *Cottage Savings Ass'n v. Commissioner*, 890 F.2d 848 (6th Cir. 1989), *petition for cert. filed*, No. 89-1965.

cuit. On the basis of a purported conflict in the circuits, the Commissioner now seeks certiorari in those four cases that taxpayers won. He also suggests that two of those cases [2] be accorded plenary review and that this case, and the remaining case,[3] be held pending resolution of the issue. In the one case in which the Commissioner prevailed, the taxpayer has petitioned for certiorari, and the Commissioner has likewise suggested that the case be held pending resolution of the cases that he believes should be accorded plenary review.

Although the Sixth Circuit reached a different result than the other circuits that have addressed the CMS issue, no conflict exists among the circuits on the sole issue as to which the Commissioner seeks this Court's review. The Sixth Circuit's decision rests on an unprecedented theory that the Commissioner is not urging even as an alternative ground for reversing the judgments for taxpayers in the four cases in which they have prevailed; indeed, the Commissioner cannot invoke this theory in these cases given the position he took in the District of Columbia and Fifth Circuits. For this reason, and because the different result reached in the Sixth Circuit is not likely to be followed by another court of appeals or to be of continuing significance even within the Sixth Circuit, there is no need for the Court to review this issue.

If, however, this Court determines that the CMS issue warrants plenary review, FNMA urges that the Court grant the petition in this case. The Commissioner's suggestion that this case be held pending the review of two of the other cases is unreasonable because this case involves far and away the largest amount of money of the CMS cases and because it does not suffer the serious justiciability problems that plague the Commissioner's proposed lead case, in which the opposing parties are both agencies of the United States Government.

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[2] *Centennial, supra,* and *First Federal, supra.*

[3] *San Antonio, supra.*

ARGUMENT

I. THE DECISIONS OF THE COURTS OF APPEALS IN THE CMS CASES PRESENT NO CONFLICT WARRANTING REVIEW BY THIS COURT

A. The Decision of the District of Columbia Circuit in this Case Was Proper and Rests on Legal Principles as to Which There is No Conflict Among the Circuits.

The Commissioner bases his plea for review of this case and other CMS cases on a purported conflict among the circuits. The D.C. Circuit's decision in this case, however, does not rest on any legal principle as to which the circuits are in conflict.

As the Commissioner notes, the cases involving the CMS issue have reached different outcomes: the taxpayers prevailed in the present case and in the three Fifth Circuit cases whereas the Commissioner prevailed in the Sixth Circuit case. These different outcomes, however, did not arise from any disputed legal issue that merits the Court's granting certiorari in this case. This is apparent from a review of the two issues raised by the CMS cases: (1) whether losses were realized pursuant to section 1001,[4] and (2) whether deductions are barred by section 165.

Realization. The only question that the Commissioner has asked this Court to review is whether losses were "realized" in the CMS transactions. All three courts of appeals have held unanimously, however, that losses were realized. Thus, the Commissioner seeks review only on an issue that has been resolved against him in each and every case. The fact that all nine court of appeals

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[4] Except as otherwise specifically noted, section references are to the Internal Revenue Code of 1954 (26 U.S.C.) as in effect for the years at issue. The relevant portions of these sections are set out in the petitioner's appendix (Pet. App. 53a-54a).

judges—and (on two occasions) all 16 Tax Court judges[5] —that have addressed the CMS issue have concluded that the losses were realized demonstrates that review of any of the CMS cases by this Court is not appropriate.

Moreover, the D.C. Circuit's opinion was clearly correct. The D.C. Circuit adopted the Commissioner's legal position and held that a taxpayer must prove that the exchanged mortgages were materially different in order to realize a loss. It then upheld the Tax Court's finding that the exchanged mortgages were in fact materially different. The Tax Court's finding rested on the uncontradicted testimony of FNMA's fact and expert witnesses that, among other things:

- the exchanged pools of mortgages were expected to perform differently because of their different obligors and underlying property (Pet. App. 30a);
- while compliance with Memorandum R-49 ensured that the mortgages would be similar in some respects, R-49 ignored most of the factors that affected the riskiness of the loans (*e.g.*, the age, employment and income of the obligor and the age, condition and specific location of the underlying property) (C.A. App. 381-82, 543-46);
- the exchanged mortgages in fact performed quite differently after the transactions in terms of delinquencies, foreclosures and prepayments (Pet. App. 30a-32a); and
- the urban mortgages FNMA acquired in the exchanges were radically different from the rural mortgages it disposed of given the different economic forces that operate on urban and rural economies (C.A. App. 383-87).

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[5] *Cottage Savings Ass'n v. Commissioner*, 90 T.C. 372 (1988) (reviewed by the full court), *rev'd on other grounds*, 890 F.2d 848 (6th Cir. 1989); and *Federal National Mortgage Ass'n v. Commissioner*, 90 T.C. 405 (1988) (reviewed by the full court), *aff'd*, 896 F.2d 580 (D.C. Cir. 1990).

Given this uncontradicted testimony, the D.C. Circuit was clearly correct in upholding the Tax Court's finding that the mortgages were materially different.

Section 165. The Sixth Circuit concluded in *Cottage* that section 165 barred the deduction of losses even though they were realized. That conclusion does not justify the grant of certiorari here for several reasons.

First, the Commissioner has not sought reversal of the D.C. Circuit's decision or of the three Fifth Circuit cases on the basis of section 165. While the Commissioner uses the result in *Cottage* to establish a conflict among the circuits, he has never suggested that *Cottage* was correctly reasoned and he has not asked the Court to adopt the *Cottage* approach even as an alternative position.

Second, the Commissioner has waived any section 165 argument. In the D.C. Circuit (and the Fifth Circuit), the Commissioner made clear that he was relying on section 165 *only* if the court held that losses would be realized even if the exchanged mortgages were not materially different. App., *infra,* 1a. Given the D.C. Circuit's holding that FNMA had to (and did) prove that the mortgages were materially different (and the parallel holding by the Fifth Circuit) in order for the losses to be realized, the Commissioner's contingent section 165 argument became irrelevant. The Commissioner may not at this late date contend that section 165 bars the deduction of losses on an exchange of mortgages that are materially different. *See Browning-Ferris Industries v. Kelco Disposal, Inc.,* 106 L. Ed. 2d 219, 239 & n.23 (1989) (refusing to consider petitioners' due process argument not raised below "in the absence of a record on the due process point developed in the District Court and the Court of Appeals").

Third, even under the Sixth Circuit's erroneous interpretation of section 165, FNMA would be entitled to deduct its losses on the CMS transactions. The Sixth Cir-

cuit's opinion appears to rest on the assumption that the exchanged mortgages were substantially identical, *Cottage, supra,* 890 F.2d at 854-55, an assumption that is untenable here given the Tax Court's finding to the contrary and the uncontradicted evidence referred to above.[6]

B. The Decision of the Sixth Circuit in *Cottage* Is Unlikely to be Followed Elsewhere and Is of Limited Significance Even Within That Circuit.

As noted above, in framing the question presented to this Court in his petitions for certiorari in *Centennial, First Federal, San Antonio* and this case, the Commissioner fails to mention section 165, even though that is the basis on which he prevailed in the Sixth Circuit. This striking avoidance of the one ground on which he has prevailed evidences, we submit, the Commissioner's view that *Cottage*'s reasoning is unfounded. Other courts are also likely to view the decision in *Cottage* as aberrant,[7] and thus to decline to follow it.

Even within the jurisdiction of the Sixth Circuit, it is doubtful that *Cottage* will have continuing significance. A change in the tax law[8] and a recent clarification of

[6] The Sixth Circuit also suggested that the presence of a nontax business purpose would invest the transactions with sufficient economic substance to overcome the demands of section 165. *Cottage, supra,* 890 F.2d at 853. Unlike in *Cottage,* the Tax Court here found that FNMA had four substantial nontax business purposes for engaging in its CMS transactions. Pet. App. 32a-35a.

[7] One of the principal reasons for this conclusion is that the Commissioner's own regulation squarely contradicts the Sixth Circuit's holding that losses were realized but not deductible under section 165 because they were not "sustained." This regulation specifically states that if a taxpayer's amount realized from a sale or exchange is less than his adjusted basis in the property, "a loss *is sustained* to the extent of the difference between such adjusted basis and the amount realized." 26 C.F.R. § 1.1001-1(a) (emphasis added). Thus, every "realized" loss is "sustained."

[8] In the Tax Reform Act of 1986, Congress specifically considered the tax treatment of transactions of the type at issue here and, in enacting a new alternative minimum tax, treated as a preference

established accounting principles [9] make future transactions such as these unlikely. As to CMS transactions that occurred prior to the effective date of this new law, FNMA is aware of only a handful of cases pending in the Tax Court with respect to which appeal would lie to the Sixth Circuit.[10] FNMA is unaware as to whether any such cases are pending in district courts with appellate venue in the Sixth Circuit.

There is likewise little prospect that cases currently pending administratively within the Internal Revenue

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item includible in "alternative minimum taxable income" 75 percent of the loss recognized "on the exchange of any pool of debt obligations for another pool of debt obligations having substantially the same effective interest rates and maturities." Section 56(g)(4)(E) of the Internal Revenue Code of 1986. Enactment of this change makes it far less likely that transactions of this type will be undertaken in the future.

[9] The key regulatory accounting rule that prompted savings institutions to enter into the CMS transactions—Memorandum R-49—has been severely undermined by Statement of Position ("SOP") 90-3 issued on February 13, 1990 by the Accounting Standards Division of the American Institute of Certified Public Accountants. SOP 90-3 concludes that debt instruments are "substantially the same" only if the instruments have the same primary obligor and meet five other criteria. It specifically notes that exchanged pools of single-family mortgages would not be considered substantially the same because the mortgages exchanged would not have the same primary obligor. While Federal Home Loan Bank Board ("FHLBB") regulators had permitted thrifts following the criteria in R-49 to treat single-family mortgages exchanged in CMS transactions as substantially identical and consequently not to report the resulting losses on their books, SOP 90-3 now clarifies that losses incurred from any such exchanges in the future should be reported for financial accounting purposes. We have lodged with the Clerk a copy of SOP 90-3.

[10] *Mayflower Savings & Loan Co. v. Commissioner*, Docket No. 1783-84; *Kenwood Savings & Loan Ass'n v. Commissioner*, Docket No. 1839-84; *Oak Hills Savings & Loan Co. v. Commissioner*, Docket No. 4724-85; *Leader Federal Savings and Loan Ass'n v. Commissioner*, Docket No. 44110-86; *Metropolitan Federal Savings and Loan Ass'n v. Commissioner*, Docket No. 6462-89.

Service ("IRS") will be controlled by *Cottage.* A solvent savings and loan whose appeal otherwise would lie to the Sixth Circuit undoubtedly would pay the disputed tax in advance and file suit for refund in the U.S. Claims Court. An appeal from that court would lie to the Federal Circuit which, we believe, would choose to follow not *Cottage* but rather the better reasoned opinions of the D.C. and Fifth Circuits and the unanimous reviewed decisions of the Tax Court. An insolvent savings and loan presumably would be unable to pay the disputed tax in advance and thus would be required to proceed in the Tax Court from which an appeal would lie to the Sixth Circuit. Such a savings and loan, however, might well be placed in Resolution Trust Corporation ("RTC") receivership by reason of its insolvency and, in that event, both parties to the case—the RTC and the IRS—would be Federal agencies. For the reasons discussed below, that circumstance would raise serious questions of justiciability under Article III of the Constitution and thus as to the jurisdiction of the Sixth Circuit to decide the issue.

II. THE PETITION IN THIS CASE SHOULD IN NO EVENT BE HELD WHILE THE CMS ISSUE IS RESOLVED IN *CENTENNIAL* AND *FIRST FEDERAL*

This case is one of four in which the Commissioner has filed a petition for certiorari on the CMS issue.[11] The Commissioner has asked that plenary review be granted in *Centennial,* which also involves an unrelated second issue. *Centennial* Pet. at 13 n.10. He has further suggested that plenary review in *First Federal* would be appropriate "[b]ecause that case involves a solvent savings institution, and [*Centennial*] involves an institution in RTC receivership." *Id.* He has stated that plenary review in *San Antonio* would not be appropriate because it is insolvent and the deficiency in that case may not be collectible, thus raising a question of mootness. *Id.* Fi-

[11] As noted above, the taxpayer has petitioned for review in the Sixth Circuit case. *Cottage, supra.*

nally, he has urged the Court to deny plenary review in the present case by holding the petition for summary disposition in light of *Centennial* and *First Federal. Id.*

The Commissioner has overlooked very serious questions of justiciability in suggesting that the Court should resolve the CMS issue by limiting its grant of plenary review to the *Centennial* and *First Federal* cases. *Centennial* involves a dispute between two Federal agencies over money that will remain in the Federal treasury regardless of the outcome, and thus does not present a case or controversy susceptible to judicial resolution under Article III of the Constitution. *First Federal* involves an insolvent institution, which at any time could be placed into receivership, thus potentially raising the same justiciability problem as presented in *Centennial.*

Therefore, only one of the four cases in which the Commissioner seeks review of the CMS issue is suitable for plenary review, and that is the present case involving FNMA. Although the Commissioner obviously prefers that the *FNMA* case not be given plenary review, he does not explain why and simply states his preference for having the issue resolved in other cases.[12] Moreover, FNMA is the taxpayer with far and away the greatest financial stake in the resolution of this issue. If this Court decides it must resolve the CMS issue, it should do so in the context of this case, where there is clear

[12] First Federal and the amicus curiae have suggested that *FNMA* might not be an appropriate case for resolving the CMS issue because FNMA was not subject to the FHLBB's Memorandum R-49 regarding the accounting treatment for mortgage swaps. *First Federal* Resp. Br. at 8 n.3; Amicus Br. at 16 n.10. This is a distinction that is irrelevant to the CMS tax issue. FNMA and its CMS partners (most of which were FHLBB-regulated thrifts) structured all of their transactions to comply with the FHLBB's Memorandum R-49. Thus, whatever effect compliance with R-49 had on making the exchanged mortgages economically similar, it affected FNMA's transactions to the same extent that it affected thrifts subject to R-49.

adversity between the parties and the taxpayer has a significant financial interest in the outcome.

A. The *Centennial* Case Is Not Justiciable Under Article III.

Centennial Savings Bank FSB has been found insolvent and placed in receivership. *Centennial* Pet. at 10 n.7. The Commissioner argues that this insolvency "presents no question of collectibility or mootness because this is a refund suit in which the United States has possession of the disputed taxes, and the question is whether those amounts must be refunded." *Id.* at 13 n.10. This is true as far as it goes, but it overlooks a more fundamental question of justiciability. Because the RTC is the real party in interest and is using taxpayers' money to carry out its role, the funds in question will remain in possession of the United States regardless of the outcome of the litigation. Thus, there is no case or controversy for purposes of Article III.

In a receivership, the claims of depositors of a savings association located in Texas have preference over those of unsecured creditors.[13] Where there is a liquidation, the Federal Deposit Insurance Corporation ("FDIC"), as custodian of the Savings Association Insurance Fund, is subrogated to the rights of the insured depositors for whom it is acting as insurer. Thus, in Texas, the FDIC's claim for recovery from the receivership assets is superior to that of the unsecured creditors. Similarly, claims accruing to the RTC on account of advances made by it in its corporate capacity to facilitate a purchase and assumption agreement between the RTC as

[13] Texas law provides for a depositor preference over unsecured creditors of a failed savings association. Tex. Rev. Civ. Stat. art. 852a, § 8.09 (1987). Under Federal regulations, a state law giving depositors priority over unsecured creditors is applied in a receivership of a federally chartered or state chartered savings association in that state. 12 C.F.R. § 549.5-1(b)(5); 12 C.F.R. § 569c.11(a)(6). Both Centennial and First Federal are Federal savings associations located in Texas.

receiver of a savings association located in Texas and a third party must be given priority over the claims of unsecured creditors. In either event, the proceeds of a refund claim against the IRS must go to benefit an agency of the United States.[14]

In the case of Centennial Savings Bank, there was a purchase and assumption agreement. The IRS claim remained with the RTC as receiver, and any funds recovered must be transferred to the RTC in its corporate capacity as partial payment for advances made.[15] At bottom, the *Centennial* case is simply an accounting dispute between two agencies over money that is, and will remain, in the hands of the government regardless of the outcome.

The Justice Department's Office of Legal Counsel has issued an opinion that a tax dispute between the IRS and the Postal Service does not present a justiciable case or controversy. Proposed Tax Assessment Against the United States Postal Service, 1 Op. Off. Legal Counsel 79 (1977). The opinion rested on the fact that the dispute (like that between the IRS and the RTC in the *Centennial* case) concerned the allocation of funds between two executive agencies with no private person involved as a real party in interest. *Id.* In other contexts as well, the

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[14] Both the FDIC and the RTC are agencies of the United States. 12 U.S.C. § 1819(b); 12 U.S.C. § 1441a(b). The RTC's funds primarily come from advances from the Treasury or the Funding Corporation which is backed by the Treasury. 12 U.S.C. § 1441a (b)(3)(C)(iii); 12 U.S.C. § 1441a(h)(4). The FDIC's funds, received as custodian of the Savings Association Insurance Fund, are similarly advanced and backed by the Treasury. 12 U.S.C. § 1821a(c).

[15] The Federal Deposit Insurance Act, in pertinent part, provides that, "[t]he receiver shall—(i) retain for the account of the Corporation such portion of the amounts realized from any liquidation as the Corporation may be entitled to receive in connection with the subrogation of the claims of depositors; and (ii) pay to depositors and other creditors the net amounts available for distribution to them." 12 U.S.C. § 1821(d)(11)(A).

Justice Department has repeatedly taken the position that the Constitution does not permit disputes between government agencies to be litigated in the Article III courts.[16]

This Court has analyzed the justiciability of interagency disputes on only two occasions. The first case involved a dispute between the government and railroads over charges for shipping government property. The Justice Department sought judicial review of an Interstate Commerce Commission ("ICC") order, which was defended by the ICC and the railroads. The Court held that it "must look behind names that symbolize the parties" and determined that the case was justiciable because the real issue was "who is legally entitled to sums of money, the Government or the railroads." *United States v. ICC*, 337 U.S. 426, 430 (1949).

The second case was *United States v. Nixon*, 418 U.S. 683 (1974). There the Court cited *United States v. ICC* for the proposition that justiciability should not be decided on the basis of a "surface inquiry" regarding the identity of the parties, and referred to a number of other

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[16] This issue has most often been presented by proposals that the Environmental Protection Agency ("EPA") be given authority to bring lawsuits against other government agencies to compel compliance with the environmental laws. The Justice Department has consistently taken the position that such proposals would be constitutionally defective. Memorandum for the Associate Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, June 23, 1978 ("EPA Litigation Against Government Agencies"); Letters to the Honorable John D. Dingell from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, October 11, 1983 and July 27, 1984, *reproduced in Superfund Reauthorization: Judicial and Legal Issues: Oversight Hearings Before the Subcomm. on Admin. Law and Gov't Relations of the House Judiciary Comm.*, 99th Cong., 1st Sess. 253-70 (1985); *Cleanup at Federal Facilities: Hearings on H.R. 3781 et al. Before the Subcomm. on Transp., Tourism, & Hazardous Materials of the House Energy & Commerce Comm.*, 100th Cong., 2d Sess. 446-54 (1988) (statement of Roger J. Marzulla, Acting Assistant Attorney General, Land and Natural Resources Division).

cases decided by this Court in which government agencies had appeared on opposing sides. 418 U.S. at 693. The Court determined that the Watergate Special Prosecutor had been granted independent authority to enforce a subpoena against the President and that, under the "unique facts" of the case, a justiciable controversy was presented. *Id.* at 693-97.

The *Centennial* case is unlike either *United States v. ICC* or *United States v. Nixon.* In the *ICC* case, the railroads were the real parties in interest opposed to the United States, and the ICC's appearance as an additional party defendant did not render the dispute purely intragovernmental. The same could be said for most of the other cases cited by this Court in the *Nixon* decision.[17]

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[17] In none of these other cases did the Court explain why the dispute was justiciable; however, in each case private parties appeared on one or both sides of the case as the real parties in interest. *See United States v. Marine Bancorporation,* 418 U.S. 602 (1974), and *United States v. Connecticut National Bank,* 418 U.S. 656 (1974) (antitrust suits by Justice Department challenging bank mergers; Comptroller of the Currency intervened in support of the banks); *Federal Maritime Board v. Isbrandtsen Co.,* 356 U.S. 481 (1958) (Isbrandtsen Co. and Secretary of Agriculture sought review of FMB order, which was defended by FMB and other carriers); *Secretary of Agriculture v. United States,* 347 U.S. 645 (1954) (Secretary of Agriculture and various shippers sought review of ICC order, which was defended by ICC and railroads); *United States ex rel. Chapman v. FPC,* 345 U.S. 153 (1953) (Secretary of the Interior and association of rural electric cooperatives sought review of FPC licensing order, which was defended by FPC and private power company); *ICC v. Jersey City,* 322 U.S. 503 (1944) (Economic Stabilization Director intervened in lawsuit challenging ICC order, which was defended by ICC and railroad). *See also United States v. FCC,* 707 F.2d 610, 612 n.2 (D.C. Cir. 1983) (government as consumer challenges FCC order approving telephone company rates); *Environmental Defense Fund v. EPA,* 510 F.2d 1292, 1296 n.3 (D.C. Cir. 1975) (Secretary of Agriculture joins manufacturer and farmers in challenging EPA order suspending pesticide registrations). *But see United States v. FMC,* 694 F.2d 793, 809-10 (D.C. Cir. 1982) (Justice Department brought antitrust challenge to FMC order; ocean carriers intervened in defense of FMC; court held case

Certainly the tax dispute in *Centennial* does not present the "unique facts" of *Nixon*, in which the Special Prosecutor sought documents from the President for the criminal prosecution of his close associates for matters in which the President was personally implicated.[18]

It would be a substantial and unwarranted extension of *ICC* and *Nixon* for this Court to hold that ordinary legal disputes among Federal agencies, in which there is no adverse private interest, are justiciable under Article III.[19]

The foregoing analysis does not depend upon whether the RTC is characterized as part of the Executive Branch or as an "independent" agency. The Office of Legal Counsel opinion on justiciability of tax disputes involving

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was justiciable despite assuming "arguendo" that Justice Department and FMC were the real parties in interest).

[18] The personal interest of President Nixon in the outcome of that case distinguishes it from ordinary disputes among government agencies. Similarly, in *Powell v. McCormack*, 395 U.S. 486 (1969), this Court entertained a lawsuit challenging a member's exclusion from the House of Representatives. The member's interest was personal as well as institutional, including a claim for back salary. This decision certainly does not suggest that the Article III courts could adjudicate internal congressional disputes over such matters as committee assignments. *See Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983).

[19] We have found only a handful of lower court decisions bearing on the justiciability of simple interagency disputes. *See Dean v. Herrington*, 668 F. Supp. 646 (E.D. Tenn. 1987) (rejecting Justice Department contention that dispute between TVA and Department of Energy is nonjusticiable), *transferred and modified sub nom. TVA v. United States*, 13 Cl. Ct. 692 (1987) (case held justiciable but agencies required first to pursue administrative resolution); *United States ex rel. TVA v. Easement and Right of Way*, 204 F. Supp. 837 (E.D. Tenn. 1962) (holding that dispute between TVA and Farmers Home Administration is nonjusticiable); *Defense Supplies Corp. v. United States Lines Co.*, 57 F. Supp. 291, 293 (S.D.N.Y. 1944), *aff'd*, 148 F.2d 311 (2d Cir. 1945) (admiralty suit by government-owned corporation against United States as ship owner is nonjusticiable).

the Postal Service recognized that the Postal Service, like the Watergate Special Prosecutor, had a degree of independence from the Executive Branch. 1 Op. Off. Legal Counsel at 83.

Nevertheless, the separation of powers concerns raised by adjudicating interagency disputes are enhanced in the *Centennial* case because both parties are agencies within the Executive Branch. The RTC is not an independent regulatory agency like the FTC or the ICC, whose members are removable by the President only for good cause. *See Morrison v. Olson,* 487 U.S. 654, 685-93 (1988); *Humphrey's Executor v. United States,* 295 U.S. 602 (1935). The RTC's Board of Directors is composed of five members, all of whom are removable at will by the President.[20] In fact, two of the RTC directors are officials in the Department of the Treasury, as is the Commissioner of Internal Revenue. Therefore, the *Centennial* case is a dispute between two government agencies within the Executive Branch and virtually within the Treasury Department.[21]

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[20] All functions of the RTC are performed by the FDIC as "exclusive manager," and the Board of Directors of the FDIC also serves as the Board of Directors of the RTC. 12 U.S.C. § 1441a(b). The Board is composed of five members: the Comptroller of the Currency; the Director of the Office of Thrift Supervision ("OTS"); and three individuals appointed by the President with the advice and consent of the Senate. 12 U.S.C. § 1812. All of these individuals are appointed to terms of fixed duration, but there is no substantive limitation on the power of the President to remove them. *Id.* (individual members); 12 U.S.C. §§ 2 (Comptroller of the Currency) & 1462a (Director of OTS). Statutes of this nature have been uniformly treated as permitting the President to remove such appointees at will. *See, e.g., Parsons v. United States,* 167 U.S. 324 (1897); *ıbal v. Reagan,* 841 F.2d 1216 (3d Cir. 1988); *Martin v. Tobin,* 451 F.2d 1335, 1336 (9th Cir. 1971). *See also* Power of the President to Remove Presidential Appointees From the National Capital Planning Commission, 6 Op. Off. Legal Counsel 191 (1982).

[21] There is also an Oversight Board, with certain general powers over the RTC, including the power under extraordinary circumstances to remove the FDIC as its exclusive manager. 12 U.S.C. § 1441a(a). This Board consists of the following five members: the

By way of contrast, FNMA is a privately owned and managed corporation, which is listed on the New York Stock Exchange. Although it was originally founded in 1938 as a government-owned corporation, all of its stock is now in private hands.[22] FNMA pays Federal taxes at the full corporate rate, and its after-tax earnings are reinvested or paid as dividends to its shareholders. The dispute between FNMA and the Commissioner in this case is thus a typical tax dispute between a private taxpayer and the government, and it suffers from none of the justiciability defects that affect the RTC cases.

B. The *First Federal* Case Involves an Insolvent Institution.

First Federal Savings and Loan Association of Temple, Texas is a no-stock Federal mutual savings and loan association that, according to the latest report of its independent auditors, incurred a net loss of $16,293,025 for

Secretary of the Treasury; the Chairman of the Board of Governors of the Federal Reserve System; the Secretary of Housing and Urban Development; and two individuals appointed by the President with the advice and consent of the Senate. Only one of these five, the Chairman of the Federal Reserve, is independent of the President in the sense of being removable only for "cause." *See* 12 U.S.C. § 242. (Even here, it is unclear whether the statutory prohibition on removal without cause applies only to his membership on the Board of Governors, or also to his position as Chairman.)

[22] The original charter of FNMA was contained in the National Housing Act, tit. III, 48 Stat. 1246 (1938). At the time of its creation, FNMA was a wholly-owned government corporation. In 1954, it became partly owned by private shareholders. Housing Act of 1954, tit. II, 68 Stat. 612. Its present structure was prescribed by legislation adopted in 1968. Housing and Urban Development Act of 1968, tit. VIII, 82 Stat. 503, 536, *codified at* 12 U.S.C. § 1716 *et seq.* Although FNMA is privately owned and managed, it is subject to the regulatory authority of the Departments of Housing and Urban Development and the Treasury. Five of its 18 directors are appointed by the President, and the balance are elected by the shareholders. The statute provides that the directors can be removed by the President only for cause. 12 U.S.C. § 1723(b).

the year ended December 31, 1989. As a result, on that date its liabilities exceeded its assets leaving it with a negative net worth of $2,200,591, which was $17,500,000 less than the minimum capital required by the Office of Thrift Supervision. First Federal's tax claim of $1,546,394 relating to the CMS issue has been retained on its books as an asset, since the lower courts have ruled in its favor. If the lower court decision is reversed, its financial position will be further impaired.

According to the audit report, "the Association is dependent upon regulatory forbearance to continue further operation." [23] Under these circumstances, it appears to be only a matter of time before First Federal is placed into receivership and its assets—including the tax claim at issue—taken over by the RTC. At that point, the *First Federal* case will suffer from the same justiciability defect as *Centennial.* If the Court concludes that it must resolve the CMS issue, it should not select for plenary review a case such as *First Federal,* which is likely to become nonjusticiable during the Court's deliberations.

C. FNMA Has By Far the Largest Financial Stake in this Dispute.

FNMA's loss deductions at issue in this case—$194,573,659 in 1980 and $70,042,179 in 1981—dwarf the losses at stake in the other CMS cases in which petitions for writs of certiorari have been filed. The loss deductions at issue in all of these cases are as follows:

Case	CMS Loss Deductions
FNMA	$264,615,838
Centennial	2,819,218
First Federal	3,715,132
San Antonio	14,956,898
Cottage	2,447,091

[23] The independent audit report, dated February 23, 1990, was prepared by Cawthron, Wommack & Coker, Waco, Texas. We have lodged with the Clerk a copy of this report.

FNMA's loss deductions thus account for over 90 percent of the total CMS losses at issue in these five cases. In contrast, the Commissioner's proposed lead case, *Centennial*, accounts for slightly less than 1 percent of these losses.

Moreover, even with respect to the total industry-wide loss deductions from CMS-style transactions, FNMA's share looms large. The Commissioner has represented to this Court that there are currently pending administratively and in the courts 96 cases involving approximately $419 million in taxes for which the liability hinges on this issue. FNMA accounts for roughly one-fourth of that amount. It is incongruous that the Commissioner would urge this Court to review *Centennial* because of the large amount of money riding on this issue industry-wide and then recommend that the Court not give plenary review to the *FNMA* case, which involves the single largest portion of the amount in dispute.

CONCLUSION

The petition for a writ of certiorari should be denied. In any event, the petition should not be held pending resolution of the CMS issue in another case.

Respectfully submitted,

JOSEPH ANGLAND *
FELIX B. LAUGHLIN
DAVID C. GARLOCK
RICHARD F. NEEL, JR.
DEWEY, BALLANTINE,
BUSHBY, PALMER & WOOD
1775 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 862-1000
Attorneys for Respondent

Of Counsel:
CARYL S. BERNSTEIN
CAROLYN J.A. SWIFT
FEDERAL NATIONAL
MORTGAGE ASSOCIATION
3900 Wisconsin Ave., N.W.
Washington, DC 20016
(202) 752-7000

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* Counsel of Record

APPENDIX

The following excerpt is from the Brief for the Commissioner (pages 72-73) filed with the District of Columbia Circuit in the *FNMA* case.

II

EVEN IF TAXPAYER REALIZED A LOSS, DEDUCTION OF THAT LOSS IS PRECLUDED BY SECTION 165 OF THE CODE

1. If this Court agrees with the position of Judge Cohen in her concurring opinion in *Cottage Savings*, 90 T.C. at 403-404, that any exchange of property is a realization event, then taxpayer would have realized a loss on the transaction. But if this Court concludes that the mortgages exchanged were not materially different, that conclusion would provide an independent ground for disallowance of taxpayer's claimed deduction, apart from the realization requirement. Losses that are realized and recognized are *deductible* only if an Internal Revenue Code provision allows the deduction. Section 165(a) generally allows a deduction for "any loss sustained during the taxable year." Not every transaction purporting to result in a loss is deductible. As we explained at p. 21, *supra*, the substance rather than the form of a transaction determines its tax consequences. Accordingly, it is well established that losses resulting from transactions that lack economic substance are not deductible under Section 165. *Higgins v. Smith*, 308 U.S. 473, 476-478 (1940); *Keats v. United States*, 865 F.2d 86, 88 (6th Cir. 1988); *Fender v. United States*, 577 F.2d 934, 936 (5th Cir. 1978); *Scully v. United States*, 840 F.2d 478, 484-486 (7th Cir. 1988); see *Yosha v. Commissioner*, 861 F.2d 494 (7th Cir. 1988). This rule has been incorporated into the regulations under Section 165, which provide: "Only a bona fide loss is allowable. Substance and not mere form shall govern in determining a deductible loss." Treas. Reg. Sec. 1.165-1(b).

We argued at pp. 50-53, *supra*, that the "materially different" requirement for realization is simply one aspect of the substance-over-form doctrine. If, however, this Court were to conclude that realization depends solely on form, then taxpayer would have realized a loss on the transactions. But since the exchanges involved property that was not materially different, nothing changed in substance; taxpayer was in the same economic position as before the transaction. The transactions therefore lacked economic substance, and the loss is not deductible under Section 165.